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Paper No. 11

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**COPY MAILED**

NOV 16 2004

**OFFICE OF PETITIONS**

In re Application of	:	
Dennis Michael Dearie	:	
Application No. 09/661,361	:	ON PETITION
Filed: 14 September, 2000	:	
For: WIRELESS AUTO INSURANCE	:	
VERIFICATION SYSTEM	:	

This is a decision on the communication filed on 22 April, 2004, styled under 37 CFR 1.137(b), which is treated as a renewed petition under 37 CFR 1.137(a), to revive the above-identified application.

The petition is again **DISMISSED**.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)" or "Renewed Petition under 37 CFR 1.137(b)." This is not a final agency decision.

This application became abandoned on 15 March, 2002, for failure to file a timely reply to the Notice to File Corrected Application Papers mailed on 14 January, 2002, which set a two (2) month shortened statutory period for reply. No extensions of the time for reply in accordance with 37 CFR 1.136(a) were obtained. Notice of Abandonment was mailed on 6 November, 2003. The petition filed on 26 November, 2003, was dismissed on 5 March, 2004.

Petitioner again asserts that he was hospitalized for an extended

period of time. Petitioner further states that his wife mailed a response to an Office communication but did not obtain a receipt.

At the outset, it is noted that petitioner submitted the present petition on the form for a petition under 37 CFR 1.137(b), but submitted only \$55.00, the fee required for a petition under 37 CFR 1.137(a). In light of petitioner's arguments that the delay was caused by his illness and hospitalization, the petition will be treated as a renewed petition under 37 CFR 1.137(a).

A grantable petition under 37 CFR 1.137(a) must be accompanied by:

(1) the required reply, unless previously filed;<sup>1</sup> In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In a nonprovisional application filed on or after June 8, 1995, and abandoned for failure to prosecute, the required reply may also be met by the filing of a request for continued examination in compliance with § 1.114. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

(2) the petition fee as set forth in 37 CFR 1.17(1);

(3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and

(4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c)).

The present petition lacks items (1) and (3).

In regard to item (1), the petition still lacks the reply required by 37 CFR 1.137(a)(1). In this regard, petitioner has still not filed the substitute specification required by the Notice mailed on 14 January, 2002. Petitioners must supply a substitute specification in compliance with 37 CFR 1.52 with any renewed petition. If a substitute specification was previously filed, petitioners may wish to supply a copy of that specification, as any well as evidence of timely filing, such as

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<sup>1</sup> In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

a certificate of mailing or itemized stamped postcard receipt.

It is noted that the substitute specification MUST be filed with a grantable petition.

In regards to item (3), decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.<sup>2</sup>

The showing of record is inadequate to establish unavoidable delay within the meaning of 37 CFR 1.137(a). Specifically, an application is "unavoidably" abandoned only where petitioner, or counsel for petitioner, takes all action necessary for a proper response to the outstanding Office action, but through the intervention of unforeseen circumstances, such as failure or mail, telegraph, telefacsimile, or the negligence of otherwise reliable employees, the response is not timely received in the Office.<sup>3</sup>

A showing of "unavoidable" delay based upon incapacitation must

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<sup>2</sup>In re Mattullath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 USPQ 666, 167-68 (D.D.C. 1963), aff'd, 143 USPQ 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." Haines v. Quiqq, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

<sup>3</sup>Ex parte Pratt, 1887 Dec. Comm'r Pat. 31 (Comm'r Pat. 1887).

establish that petitioner's incapacitation was of such nature and degree as to render petitioner unable to conduct business (e.g., correspond with the Office) during the period between 14 March, 2002, and 26 November, 2003. Such a showing must be supported by a statement from petitioner's treating physician, and such statement must provide the nature and degree of petitioner's incapacitation during this above-mentioned period. Petitioner must provide a statement from petitioner's treating physician listing in detail the diagnosed disability affecting petitioner, the time period during which petitioner was or is incapacitated, and the degree to which the disability has impaired and continues to impair petitioner's ability to prosecute the instant patent application.

While petitioner has supplied copies of numerous medical bills and statements, no statement from petitioner's treating physician as described above has been provided. As such, although petitioner has shown that he was hospitalized on several occasions between October, 2000 and March, 2004, petitioner has still not provided a showing that his incapacitation was of such an extent that such incapacitation rendered the delay in prosecution of the application unavoidable.

In summary, while the circumstances surrounding petitioner's condition are most unfortunate, the Office is unable to grant the relief requested without a showing of unavoidable delay as described above. As such, the petition must again be dismissed.

#### **ALTERNATIVE VENUE**

Petitioner may wish to consider filing a renewed petition under 37 CFR 1.137(b),<sup>4</sup> which now provides that where the delay in

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<sup>4</sup>Effective December 1, 1997, the provisions of 37 CFR 1.137(b) now provide that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(b). A grantable petition filed under the provisions of 37 CFR 1.137(b) must be accompanied by:

(1) the required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In a nonprovisional application filed on or after June 8, 1995, and abandoned for failure to prosecute, the required reply may also be met by the filing of a request for continued examination in compliance with § 1.114. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

(2) the petition fee as set forth in 37 CFR 1.17(m);  
(3) a statement that the entire delay in filing the required reply from the due

reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(b).

The filing of a petition under the unintentional standard cannot be intentionally delayed and therefore should be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

As no fee was due for a renewed petition under 37 CFR 1.137(a), the \$55.00 fee submitted with the present renewed petition may be applied to the fee for a petition under 37 CFR 1.137(b) should petitioner choose to file such a petition.

A copy of the form for filing a petition under 37 CFR 1.137(b) to revive an application unintentionally abandoned is enclosed herewith for petitioner's convenience.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petition  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

By FAX: (703) 872-9306  
Attn: Office of Petitions

By hand: U.S. Patent and Trademark Office  
2011 South Clark Place  
Customer Window  
Crystal Plaza 2, Lobby, Room 1B03  
Arlington, VA 22202

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date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional. The Commissioner may require additional information where there is a question whether the delay was unintentional; and

(4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c)).

Telephone inquiries related to this decision should be directed to the undersigned at 571-272-3231.



Douglas I. Wood  
Senior Petitions Attorney  
Office of Petitions

Enclosure:      Form PTO/SB/64  
                    Fee Schedule  
                    Privacy Act Statement